Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd

FEDERAL COURT (KUALA LUMPUR) — FEDERAL COURT APPEAL NO 02-6 OF 1994

CHONG SIEW FAI CJ (SABAH & SARAWAK), EDGAR JOSEPH JR AND MOHAMED DZAIDDIN FCJJ

26 MAY 1999

Companies and Corporations *— Shares — Dealing by company in its own shares — Financial assistance for purchase of company's own shares — Breach of s 67 of Companies Act 1965 — Effect of — Company obtained loan from financial instituion on security of charge over its land to enable purchaser to purchase company's shares — Company's liability on loan and security unaffected by breach of s 67(1) — Saving provision of s 67(6) — Exception to s 24 of Contracts Act 1950*

Civil Procedure *— Originating summons — Illegal security given in contravention of s 67 of Companies Act 1965 — Plea of illegality of loan transaction — Conflict of evidence resolved based upon affidavits, contemporary documents and submissions of counsel —Whether court should have converted action into writ action for full investigation at open trial — Discretion of court*

The Majlis Amanah Rakyat ('MARA') owned approximately 99% of the shares of the appellant ('the Borrower Company') and appointed Technivest Sdn Bhd ('Technivest') to manage the appellant. Subsequently, MARA offered to sell their shares in the appellant to Technivest. Technivest needed financing to acquire the shares and it applied to the respondent ('the Lender') for a loan facility to complete the purchase. The respondent responded to the appellant by offering a term loan of RM4.3 million ('the first offer'). The appellant had stated to the respondent that the purpose of the loan was to pay MARA for the settlement of the appellant's liabilities with MARA and its subsidiaries. As secuity for the loan, there were to be a charge over the appellant's land, a debenture over all the appellant's present and future assets and Technivest, several guarantees from the directors of the appellant, and a corporate guarantee from Technivest. A formal sale and purchase agreement was duly executed by MARA and Technivest wherein it was provided, inter alia, that the purchase price was to be RM130,000 and that Technivest would pay MARA the sum of RM4,329,320 in full and final settlement of the loans which MARA has made to the appellant together with the sum of RM117,000, it being the balance purchase price for the shares, whereupon MARA would transfer the shares to Techinvest. The appellant then wrote to the respondent enclosing a copy of the sale and purchase agreement and asked for an undertaking that the RM4.3 million would be forthcoming to pay MARA for the settlement of its liabilities. Meanwhile, MARA had been advised by their solicitors that the proposal by the appellant to obtain finance to settle its obligation under the sale and purchase agreement would violate s 67 of the Companies Act 1965 and the respondent's solicitors were also

notified. The respondent then wrote to the appellant that their offer letter was withdrawn. After a lapse of three months, the appellant submitted a fresh application for a fresh term loan and flexi-loan facilities of RM4.3 million and RM0.5 million. The appellant represented to the respondent that the RM4.3 million was required as working capital, whereupon the respondent extended an offer ('the second offer') to the appellant for this facility. The appellant then passed a resolution accepting the second offer and agreeing to give the required securities which included the charge over the land. Subsequently, the respondent obtained a confirmation in writing from the appellant that all the shares which were the subject matter of the sale and purchase agreement had already been transferred by MARA to Technivest before the second offer was made. The charge and loan agreement were duly executed and the appellant issued a drawdown notice for RM4.3 million on the loan, upon which the respondent disbursed the loan. The appellant subsequently defaulted on repayment of the loan and the respondent recalled the entire facility and commenced proceedings, through an originating summons, for an order under s 256 of the National Land Code 1965 ('the Code') for the sale of the charged land. The appellant entered appearance through its interim receiver who, through his representative Mr Fernandis, put in an affidavit in opposition alleging a breach of s 67 of the Companies Act 1965, read with s 24 of the Contracts Act 1950, on the ground that the loan was granted in the nature of financial assistance for the purpose of, and in connection with, the purchase of MARA's shares in the appellant by Technivest. The High Court, being satisfied that the appellant had failed to satisfy him of the existence of 'cause to the contrary' within the meaning of s 254(3) of the Code, allowed the respondent's application. The court also ordered that the appellant, the interim receiver and his representative be jointly and severally liable for the costs arising out of and incidental to these proceedings. The appellant, through the intervener, appealed to the Court of Appeal.

In the appeal, the appellant contended that: (a) the judge was wrong in law in determining the plea of illegality founded upon a breach of s 67 of the Companies Act 1965, read with s 24 of the Contracts Act 1950, purely upon the affidavits, contemporary documents and correspondence and submissions of counsel on both sides, when the circumstances of the case were such that only after a full investigation at a trial in open court, could the issue of illegality have been regularly tried. As such, the judge ought to have exercised his discretion and converted the originating summons into a writ action; and (b) alternatively, the judge was wrong in law in holding that the loan facility arrangements was not in the nature of financial assistance given directly or indirectly for the purpose of, or in connection with, the purchase by Technivest from MARA of MARA's shares in the appellant, and therefore not in contravention of s 67 of the Companies Act 1965 read with s 24 of the Contracts Act 1950.

A The issues before the Court in respect of the second contention of the appellant were: (a) whether a breach of s 67 of the Companies Act 1965 had any civil consequences; (b) whether the effect of s 67(6) was to save a transaction which contravened s 67(1) from invalidity; and (c) whether s 67(6) excluded the operation of 24 of the Contracts Act 1950.

B

Held, dismissing the appeal:

(1) The only material relied on by the appellant in support of the plea of illegality was an affidavit by Mr Augustine who claimed to be a representative of the court-appointed receiver. Mr Augustine was C not a party to the transactions and, naturally, had no personal knowledge of the same (see p 96E–G). No attempt had been made by Mr Augustine to disclose the sources of his information and belief to ground his allegations of illegality and, on this ground alone, the judge would have been justified in refusing to look at Mr Augustine's affidavit; *Re JL Young Manufacturing Ltd* D *Co* [1900] 2 Ch 753 and *Cantrans Services Services (1965) Ltd v Clifford* [1974] 1 MLJ 141 followed. Nevertheless, the judge did embark upon a most careful examination of the allegations of illegality made by Mr Augustine and, having done so, he was amply justified in resolving the conflict of evidence on affidavit, in accordance with the principles enunciated in *Eng Mee Yong v* E *Letchumanan* [1979] 2 MLJ 212 and coming down strongly in favour of the respondent. The Court can detect no error in his reasoning when exercising his discretion regarding this part of the case. It would therefore have been a pointless exercise for the judge to have converted the originating summons into a writ F action. At a trial in open court, there is no ground for supposing that the quality of Mr Augustine's testimony would have been superior to his affidavit evidence. Indeed, most probably, cross-examination would have made it even clearer that his allegations were virtually worthless as evidence and would thus have led to an unnecessary prolongation of proceedings and G increased costs (see p 98A–D).

(2) The judge does not appear to have addressed the question whether a breach of s 67 has civil consequences in depth and this may well have been because he felt that he was bound by the decision of the Supreme Court in *Chung Khiaw Bank Ltd v Hotel* H *Rasa Sayang Sdn Bhd* [1990] 1 MLJ 356 (see p 99F–G).

(a) The Court finds it difficult to agree with the ex cathedra pronouncement of the Supreme Court that the scope of s 67(6) is confined to the protection of the company and no one else. Looking at the second limb of sub-s (6) of s 67, the Court considers that the section was enacted for the I protection of the company's funds and the interests of shareholders as well as creditors and the general public. There is no valid reason why its operation should be limited only to

enabling a company to recover loans granted by it (see pp 105D, 106C–D).

(b) The court in *Chung Khiaw Bank* was unduly swayed by certain English authorities. These English cases were really of little assistance since the relevant legislation on which they were decided did not contain a saving provision equivalent to our sub-s (6) of s 67 of the Companies Act. Yet another difference was that the prohibition under the relevant English legislation imposed criminal liability not only on officers of the company but also the compnay itself, whereas under our s 67, criminal liability is imposed not on the company but only on officers of the company (see p 106E–F); *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd* [1990] 1 MLJ 356 not followed.

(3) In so far as sub-s (6) of s 67 of the Companies Act enables any person to recover any moneys in respect of a security in contravention of the section, the subsection appears to be a statutory recognition of the rule in *Victor Battery Co Ltd v Curry's Ltd & Ors* [1946] Ch 242 wherein it was decided that an illegal security given by a company to finance the purchase of its own shares contrary to s 45(1) of the Companies Act 1929 (UK) (being the equivalent of our s 67(1) of the Act) was not avoided. The Court would add, however, that the Companies Act 1929 (UK) did not have a provision equivalent to our sub-s (6) of s 67. It follows that even if *Victor Battery* was wrongly decided, it matters not for the principle enunciated therein has been statutorily recognized in sub-s (6) of s 67 (see p 107F–G).

(4) In *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd* [1990] 1 MLJ 356, as a result of the Court failing to actually construe the five words 'for which it becomes liable' in sub-s (6) of s 67, the Court took a wrong turning and placed undue stress on the provisions of s 24 of the Contracts Act 1950 and held that because the bank had knowledge of the illegality and the nature of the transaction at the material time, the bank's claim failed. In the present Court's view, s 67(6) creates an important exception to s 24 of the Contracts Act 1950 by allowing recovery under an illegal contract, thereby excluding the operation of s 24. In a situation where a company obtains a loan from a financial institution on the security of a charge over its land for the purpose of enabling an intending purchaser to purchase shares of the company, the company's liability to the financial institution both in respect of the loan and the security remains unaffected, having regard to the saving provision in the second limb of sub-s (6) of s 67 of the Companies Act. Consequently, the appellant's allegations, even if true, would not provide the existence of 'cause to the contrary' within the meaning of s 256(3) of the National Land Code 1965 (see pp 107H–108F).

(5) Having regard to the circumstances of the case as a whole, the grounds upon which the interim receiver and Mr Augustine were ordered personally to pay costs incurred, could be disputed. The fact that they had relied on professional legal advice in opposing the originating summons is a factor which should have told in their favour rather than against. Both the orders requiring the interim receiver and Mr Augustine to be personally liable for costs in respect of the relevant portion of the proceedings are set aside (see p 109C–E).

[Bahasa Malaysia summary

Majlis Amanah Rakyat ('MARA') memiliki lebih kurang 99% daripada saham-saham perayu ('Syarikat Peminjam tersebut') dan telah melantik Technivest Sdn Bhd ('Technivest') untuk menguruskan perayu. Kemudian, MARA membuat tawaran untuk menjual saham-saham mereka di dalam perayu kepada Technivest. Technivest memerlukan bantuan kewangan untuk memperolehi saham-saham tersebut dan ia memohon kepada penentang ('Pemberi Pinjaman tersebut') untuk kemudahan pinjaman untuk menyempurnakan pembelian tersebut. Penentang menjawab kepada perayu dengan menawarkan suatu pinjaman tetap sebanyak RM4.3 juta ('tawaran pertama tersebut'). Perayu telah menyatakan kepada penentang bahawa tujuan pinjaman tersebut adalah untuk membayar MARA untuk penyelesaian liabiliti-liabiliti perayu dengan MARA dan subsidiari-subsidiarinya. Sebagai jaminan untuk pinjaman tersebut, akan terdapat suatu gadaian ke atas tanah perayu, suatu debentur ke atas semua aset semasa dan masa depan perayu dan Technivest, beberapa gerenti daripada pengarah-pengarah perayu, dan gerenti korporat daripada Technivest. Suatu perjanjian jual beli formal telah disempurnakan oleh MARA dan Technivest di mana adalah diperuntukkan, antara lain, bahawa harga belian adalah RM130,000 dan Technivest akan membayar MARA jumlah sebanyak RM4,329,320 untuk penyelesaian penuh dan muktamad akan pinjaman-pinjaman tersebut di mana MARA telah memberi kepada perayu bersama-sama dengan jumlah sebanyak RM117,000, yang merupakan baki harga belian untuk saham-saham tersebut, dan selanjutnya MARA akan memindah saham-saham tersebut kepada Technivest. Perayu kemudian telah menulis kepada penentang melampirkan sesalinan perjanjian jual beli tersebut dan meminta akan akujanji bahawa RM4.3 juta akan diberikan untuk membayar MARA untuk penyelesaian liabiliti-liabilitinya. Sementara itu, MARA telah dinasihatkan oleh peguamcara-peguamcaranya bahawa cadangan perayu untuk mendapatkan kewangan untuk menyelesaikan tanggungjawabnya di bawah perjanjian jual beli tersebut akan melanggar s 67 Akta Syarikat 1967 dan peguamcara-peguamcara responden telah juga diberi notis. Responden kemudian telah menulis kepada perayu bahawa surat tawaran mereka adalah ditarik balik.

Setelah selang tiga bulan, perayu menyerahkan suatu permohonan baru untuk suatu pinjaman tetap baru dan kemudahan-kemudahan pinjaman-flexi untuk RM4.3 juta dan RM0.5 juta. Perayu menerangkan kepada responden bahawa RM4.3 juta tersebut adalah diperlukan sebagai modal kerja, dan selanjutnya responden telah menghulurkan suatu tawaran ('tawaran kedua tersebut') kepada perayu untuk kemudahan ini. Perayu kemudian meluluskan resolusi menerima tawaran kedua tersebut dan bersetuju memberi jaminan-jaminan yang perlu yang termasuk gadaian ke atas tanah tersebut. Kemudian, responden memperolehi pengesahan bertulis daripada perayu bahawa semua saham-saham tersebut yang mana merupakan isi perjanjian jual beli tersebut telah dipindah oleh MARA kepada Technivest sebelum tawaran kedua tersebut dibuat. Gadaian dan perjanjian pinjaman tersebut telah disempurnakan dan perayu mengeluarkan notis pengeluaran untuk RM4.3 juta di atas pinjaman tersebut, atas mana responden telah membayar pinjaman tersebut. Perayu kemudiannya ingkar di atas pembayaran balik pinjaman tersebut dan responden menarik balik keseluruhan kemudahan tersebut dan memulakan prosiding, melalui saman pemula, untuk suatu perintah di bawah s 256 Kanun Tanah Negara 1965 ('Kanun tersebut') untuk jualan tanah yang digadaikan tersebut. Perayu memasukkan kehadiran melalui penerima interimnya, yang melalui wakilnya En Fernandis, memasukkan suatu afidavit bantahan mendakwa kemungkiran s 67 Akta Syarikat 1965, dibaca dengan s 24 Akta Kontrak 1950, di atas alasan bahawa pinjaman tersebut adalah diberikan di dalam bentuk bantuan kewangan untuk tujuan, dan berkaitan dengan, pembelian saham-saham MARA di dalam perayu oleh Technivest. Mahkamah Tinggi, yang tidak berasa puas hati bahawa perayu gagal untuk menyakinkannya akan kewujudan 'sebab sebaliknya' di dalam makna s 254(3) Kanun tersebut, membenarkan permohonan responden. Mahkamah juga memerintahkan perayu, penerima interim dan wakilnya bertanggungjawab secara bersesama dan berasingan untuk kos-kos yang timbul daripada dan berkaitan dengan prosiding ini. Perayu, melalui pencelah, merayu kepada Mahkamah Rayuan.

Di dalam rayuan, perayu menegaskan bahawa: (a) hakim tersebut adalah silap di bawah undang-undang dalam menentukan alasan kepenyalahan undang-undang yang berdasarkan suatu kemungkiran s 67 Akta Syarikat 1965 dibaca bersama dengan s 24 Akta Kontrak 1950, semata-mata di atas afidavit-afidavit, dokumen-dokumen dan surat-menyurat kontemporari dan hujahan-hujahan peguam kedua-dua parti, apabila keadaan-keadaan kes tersebut adalah sedemikian bahawa selepas sahaja suatu penyiasatan penuh di perbicaraan di mahkamah terbuka, baharu boleh isu kepenyalahan undang-undang dibicarakan mengikut aturan. Dengan demikian, hakim tersebut seharusnya melaksanakan budi bicara beliau dan menukarkan saman pemula tersebut kepada suatu tindakan writ; dan

(b) secara alternatifnya, hakim tersebut telah silap di bawah undang-undang dalam memutuskan bahawa persediaan-persediaan kemudahan pinjaman tersebut bukannya merupakan bentuk bantuan kewangan yang diberikan dengan langsung atau tidak langsung untuk tujuan, atau berkaitan dengan, pembelian oleh Technivest dari MARA akan saham-saham MARA di dalam perayu, dan maka bukannya melanggar s 67 Akta Syarikat 1965 dibaca bersama dengan s 24 Akta Kontrak 1950.

Isu-isu di hadapan Mahkamah berkenaan dengan pendapat kedua perayu adalah: (a) sama ada kemungkiran s 67 Akta Syarikat 1965 mempunyai sebarang akibat-akibat sivil; (b) sama ada kesan s 67(6) adalah untuk menyelamatkan suatu urus niaga yang melanggar s 67(1) daripada ketaksahan; dan (c) sama ada s 67(1) mengecualikan operasi s 24 Akta Kontrak 1950.

Diputuskan, menolak rayuan:

(1) Bahan tunggal yang didasarkan oleh perayu untuk menyokong alasan kepenyalahan undang-undang adalah afidavit oleh En Augustine yang mendakwa adalah wakil penerima yang dilantik mahkamah. Encik Augustine bukannya parti kepada urus niaga-urus niaga tersebut, dan sudah tentu, tidak mempunyai pengetahuan peribadi tentang urus niaga-urus niaga tersebut (lihat ms 96E–G). Tiada percubaan telah dibuat oleh En Augustine untuk mendedahkan sumber-sumber maklumat dan kepercayaan beliau untuk memberi asas kepada dakwaan-dakwaan beliau akan kepenyalahan undang-undang dan, atas alasan ini sahaja, hakim tersebut mempunyai justifikasi untuk enggan melihat akan afidavit En Augustine; *Re JL Young Manufacturing Ltd Co* [1900] 2 Ch 753 dan *Cantrans Services Services (1965) Ltd v Clifford* [1974] 1 MLJ 141 diikut. Walau bagaimanapun, hakim tersebut ada memulakan suatu pemeriksaaan yang amat berhati-hati akan dakwaan-dakwaan kepenyalahan undang-undang tersebut yang dibuat oleh En Augustine dan, setelah berbuat demikian, beliau mempunyai justifikasi yang lebih daripada cukup dalam menyelesaikan pertikaian keterangan atas afidavit, selaras dengan prinsip yang dinyatakan dalam *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212 dan berpihak dengan kuatnya kepada penentang. Mahkamah mengesan tiada kesilapan di dalam pemikiran beliau apabila melaksanakan budi bicara beliau berkenaan dengan bahagian kes ini. Maka, adalah usaha sia-sia untuk hakim tersebut untuk menukar saman pemula tersebut kepada tindakan writ. Di perbicaraan di dalam mahkamah terbuka, tiada alasan untuk mengatakan bahawa kualiti testimoni En Augustine adalah unggul berbanding dengan keterangan afidavit beliau. Memangnya, adalah besar kemungkinan, pemeriksaan balas akan membuat ia lebih jelas bahawa dakwaan-dakwaan beliau adalah

hampir-hampir tidak bernilai sebagai keterangan dan hanya akan memanjangkan prosiding tersebut dan menaikkan kos-kos (lihat ms 98A–D). A

(2) Hakim tersebut nampaknya tidak menjawab persoalan sama ada kemungkiran s 67 mempunyai kesan-kesan sivil secara mendalam dan ini mungkin disebabkan oleh kerana beliau adalah terikat dengan keputusan Mahkamah Agong dalam *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd* [1990] 1 MLJ 356 (lihat ms 99F–G). B

(a) Mahkamah mendapati sukar untuk bersetuju dengan pengumuman ex cathedra oleh Mahkamah Agong bahawa skop s 67(6) adalah terbatas kepada perlindungan syarikat tersebut sahaja dan bukannya orang lain. Melihat kepada bahagian kedua sub-s (6) akan s 67, Mahkamah membuat pertimbangan bahawa seksyen tersebut adalah digubal untuk perlindungan kewangan syarikat tersebut dan kepentingan-kepentingan pemegang-pemegang saham dan juga pemiutang-pemiutang dan orang awam amnya. Tiada terdapat alasan sah mengapa operasinya harus dihadkan hanya untuk membolehkan sesebuah syarikat untuk mendapat kembali pinjaman-pinjaman yang diberikan olehnya (lihat ms 105D, 106C–D). C D

(b) Mahkamah dalam *Chung Khiaw Bank* adalah terlalu terpengaruh oleh authoriti-authoriti Inggeris yang tertentu. Kes-kes Inggeris ini sebenarnya merupakan bantuan yang sedikit kerana perundangan yang relevan atas mana ia diputuskan tidak mengandungi peruntukan pengecualian yang sama dengan sub-s (6) akan s 67 Akta Syarikat kita. Satu lagi perbezaan adalah larangan di bawah perundangan Inggeris yang relevan mengenakan liabiliti jenayah bukan sahaja ke atas pegawai-pegawai syarikat tersebut tetapi juga ke atas syarikat tersebut, manakala di bawah s 67 kita, liabiliti jenayah tidak dikenakan ke atas syarikat tersebut tetapi ke atas pegawai-pegawai syarikat tersebut sahaja (lihat ms 106E–F); *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd* [1990] 1 MLJ 356 tidak diikut. E F G

(3) Sejauh mana sub-s (6) akan s 67 Akta Syarikat membolehkan mana-mana orang untuk mendapat kembali apa-apa wang berkenaan dengan jaminan yang melanggari seksyen tersebut, subseksyen tersebut nampaknya merupakan pengiktirafan statutori akan peraturan dalam *Victor Battery Co Ltd v Curry's Ltd & Ors* [1946] Ch 242 di mana adalah diputuskan bahawa jaminan menyalahi undang-undang yang diberikan oleh syarikat untuk membiayai pembelian saham-sahamnya sendiri yang bertentangan dengan s 45(1) Akta Syarikat 1929 (UK) (yang mana adalah sama dengan s 67(1) Akta tersebut kita) adalah tidak dihindari. Mahkamah akan menambah, walau bagaimanapun, bahawa Akta Syarikat 1929 (UK) tidak mempunyai suatu H I

peruntukan sama dengan sub-s (6) akan s 67 kita. Maka, adalah bermakna bahawa jikalau *Victor Battery* adalah diputuskan dengan silapnya, ia tidak penting kerana prinsip yang dinyatakan di dalamnya telah diiktiraf secara statutori di dalam sub-s (6) akan s 67 (lihat ms 107F–G).

(4) Dalam *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd* [1990] 1 MLJ 356, akibat daripada kegagalan mahkamah untuk sebenarnya mentafsirkan lima perkataan-perkataan 'untuk mana ia adalah bertanggungjawab' di dalam sub-s (6) akan s 67, mahkamah tersebut telah mengambil belokan yang silap dan meletakkan tekanan yang tidak wajar ke atas peruntukan s 24 Akta Syarikat 1950 dan memutuskan bahawa oleh kerana bank tersebut mempunyai pengetahuan tentang penyalahan undang-undang tersebut dan bentuk urus niaga tersebut pada masa yang material, tuntutan bank tersebut gagal. Di dalam pandangan Mahkamah kini, s 67(6) mewujudkan pengecualian penting kepada s 24 Akta Kontrak 1950 dengan membenarkan tindakan mendapat kembali di bawah kontrak yang menyalahi undang-undang, maka dengan itu mengecualikan operasi s 24. Di dalam situasi di mana suatu syarikat memperolehi pinjaman daripada institusi kewangan atas jaminan gadaian ke atas tanahnya untuk tujuan membolehkan pembeli yang berniat untuk membeli saham-saham syarikat tersebut, liabiliti syarikat tersebut kepada institusi kewangan berkenaan kedua-dua pinjaman dan gadaian tersebut adalah tidak terjejas, dengan mengambil kira peruntukan pengecualian di dalam bahagian kedua sub-s (6) akan s 67 Akta Syarikat. Akibatnya, dakwaan-dakwaan perayu, jikalau adalah benar, tidak akan terjumlah kepada kewujudan akan 'alasan sebaliknya' dalam lingkungan makna s 256(3) Kanun Tanah Negara 1965 (lihat ms 107H–108F).

(5) Mengambil kira keadaan-keadaan kes secara keseluruhannya, alasan-alasan atas mana penerima interim dan En Augustine diperintahkan secara peribadi untuk membayar kos-kos yang timbul, adalah boleh dipertikaikan. Fakta bahawa mereka telah bergantung kepada nasihat guaman profesional di dalam membantah saman pemula tersebut merupakan suatu faktor yang mana sepatutnya diberitahu untuk lebih menyokong kepada mereka daripada menentang. Kedua-dua perintah yang memerlukan penerima interim dan En Augustine untuk bertanggungan secara peribadi untuk kos-kos berkenaan dengan bahagian relevan prosiding adalah diketepikan (lihat ms 109C–E).]

Notes

For cases on dealing by company in its own shares, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 501–503.

Cases referred to

Bankruptcy Notice, Re [1924] 2 Ch 76 (refd)
Batu Pahat Bank Ltd v Official Assignee of the property of Tan Keng Tin [1933] AC 691 (refd)
Bunt v Hallinan [1985] 1 NZLR 450 (refd)
Carney v Herbert & Ors [1985] 1 All ER 438 (refd)
Cantrans Services (1965) Ltd v Clifford [1974] 1 MLJ 141 (follld)
Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid [1979] 2 MLJ 244 (refd)
Chapman, Re; Cocks v Chapman [1896] 1 Ch 323 (refd)
Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd [1990] 1 MLJ 356 (not follld)
Cope v Rowlands (1836) 150 ER 707 (refd)
Curtis's Furnishing Stores Ltd (In liquidation) v Freedman [1966] 2 All ER 955 (refd)
Datuk Tan Lay Teck v Sarjana Sdn Bhd & Ors [1997] 3 AMR 2718 (refd)
De Montmorency v Pratt (1849) 12 I Eq R 411 (refd)
Delacherois v Wrixon (1850) 2 In Jur 67 (refd)
Doolan, Re (1843) 2 Con & Law 232 (refd)
Eng Mee Yong v Letcumanan [1979] 2 MLJ 212 (refd)
Ferguson, Re; ex p Thorne (In Liquidation) (1969) 14 FLR 311 (refd)
Gherulal Parakh v Mahadeodas [1959] Supp SGR 406; [1959] ASC 781 (refd)
Heald & Anor v O'Connor [1971] 2 All ER 1105; [1971] 1 WLR 497 (refd)
Hill, Re; Hill v Pilcher [1896] 1 Ch 962 (refd)
JL Young Manufacturing Ltd Co, Re [1900] 2 Ch 753 (follld)
Kan Yeow Wing v Keng Soon Motor Finance Co [1962] MLJ 391 (refd)
Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Ors [1990] 1 MLJ 485 (refd)
Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] 1 All ER 300 (refd)
Littlewood v George Wimpey & Co Ltd & Anor [1953] 2 All ER 915 (refd)
Payne v Lamb (1844) 8 I Eq R 517 (refd)
Mahmoud and Ispahani, Re an Arbitration between [1921] 2 KB 716 (refd)
Menaka v Lum Kum Chum [1977] 1 MLJ 91 (refd)
Mookapillai & Anor v Liquidator, Sri Saringgit Sdn Bhd & Ors [1981] 2 MLJ 114 (refd)
O'Kelly v Gregg (1838) Jo & Car 76 (refd)
Phoenix General Insurance Co of Greece SA v Administratia Asigurarilor de Stat [1987] 2 All ER 152 (refd)
Selangor United Rubber Estates Ltd v Cradock (a bankrupt) & Ors (No 3) [1968] 2 All ER 1073 (refd)
Scott v Brown, Doering, McNab & Co [1892] 2 QB 724 (refd)
Skelton v South Auckland Blue Metals Ltd [1969] NZLR 955 (refd)
Suffield and Watts, Re; ex p Brown (1888) 20 QBD 693; 36 WR 303 (refd)

A *Tay Bok Choon v Tahanson Bhd* [1987] 1 MLJ 433 (refd)
Trevor & Anor v Whitworth & Anor (1887) 12 App Cas 409 (refd)
St John Shipping Corp v Joseph Rank Ltd [1956] 3 All ER 683 (refd)
Victor Battery Co Ltd v Curry's Ltd & Ors [1946] Ch 242 (refd)
Vita Food Products Inc v Unus Shipping Co Ltd (in liquidation) [1939] 1 All ER 513 (refd)
B *Wai Hin Tin Co Ltd v Lee Chow Beng* [1968] 2 MLJ 251 (refd)
Wallersteiner v Moir [1974] 3 All ER 217 (refd)
Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd & Ors (1978) 139 CLR 410 (refd)

C **Legislation referred to**

Civil Law Act 1956 s 3
Companies Act [Aust]
Companies Act 1929 s 45(1) [UK]
Companies Act 1948 s 54 [UK]
D Companies Act 1965 ss 67, 67(1), (3), (6)
Companies Ordinance (No 49 of 1940) ss 47, 48
Contracts Act 1950 ss 24, 66
Contracts Act s 23 [India]
Moneylender's Ordinance s 8(c)
E National Land Code 1965 ss 254(3), 256, 256(3), 257(1), (2), (3)

KS Narayanan (*WK Leong* and *Saranjit Singh* with him) (*Riza Leong & Partners*) for the appellant.

Shahul Hamid Amiruddin (*Khairuzzaman Muhammed* with him) (*Albar Zulkifly & Yap*) for the respondent.

F **Edgar Joseph FCJ** (delivering judgment of the court):

Preliminary

This appeal is from an order of the High Court, Shah Alam, allowing an application by way of Original Summons by Arab-Malaysian Finance Bhd, G the respondent herein ('the Lender'), for an order under s 256 of the National Land Code 1965 ('the Code') for the sale of certain land comprised in LO No 28, Jalan 223, Section 20, QT(R) 6300 Bandar Petaling Jaya ('the Land') which was the subject matter of a charge registered in its favour by Lori (M) Bhd, the appellant herein ('the Borrower Company') given by way of security for a loan of RM 4.3 million ('the H Charge'). The judge had, of course, made the order aforesaid because he was satisfied that the Borrower Company had failed to satisfy him of the existence of 'cause to the contrary' as required by s 256(3) of the Code.

The Background Facts

I The undisputed facts were that in the midst of a takeover battle, the directors of the Borrower Company had on 19 November 1991 obtained an order of the High Court appointing an Interim Receiver to protect the Borrower Company's assets and it is he who resisted the Originating

Summons to enforce the Charge, upon the ground that the loan aforesaid and the charge were granted in contravention of s 67 of the Companies Act 1965 ('the Act'), read with s 24 of the Contracts Act 1950. In particular, the case for the Borrower Company was that the loan aforesaid had been granted in the nature of financial assistance for the purpose of, and in connection with, the purchase by Technivest Sdn Bhd ('Technivest') from Majlis Amanah Rakyat ('MARA'), of its shares in the Borrower Company.

Of the Borrower Company's entire paid up capital of 10,633,920 shares, MARA owned as much as 10,475,500 shares ('the shares') or, in other words, approximately 99% of the Borrower Company's entire paid up capital. The 1 November 1989 saw MARA appointing Technivest to manage the Borrower Company.

The contemporary correspondence showed that MARA had, by a letter dated 21 September 1989, offered to sell the shares to Technivest, pursuant to a proposal by Technivest's Chairman Dato Bashah Nordin that the Borrower Company be privatised. Technivest responded by letter dated 28 September 1989 accepting the offer.

To acquire the shares, Technivest needed money, so it applied by letter dated 30 October 1989, signed by its Chairman Dato Bashah Nordin, addressed to the Lender for a loan facility to complete the purchase. The Lender replied by letter dated 30 November 1989 to the Borrower Company offering a term loan of RM4.3 million ('the first offer'). The Borrower Company had stated to the Lender that the purpose of the loan was 'to pay MARA for the settlement of Lori Malaysia Bhd's liabilities with MARA and its subsidiaries'. As for the security for the loan, there were to be a charge over the Land, a debenture over all the present and future assets of the Borrower Company and Technivest and Joint and several guarantees from the Borrower Company's Directors Dato Bashah Nordin, Ismail Affandi, Mustapha Hamat, Omar Abu Bakar and a corporate guarantee from Technivest.

Then, on 1 December 1989, a formal sale and purchase agreement ('the Sale and Purchase Agreement') was prepared by the legal firm of Messrs Abdullah and Zainuddin on behalf of MARA and duly executed by the authorised signatories in MARA and Technivest. It provided that the purchase price was to be RM130,000. It further provided by clauses 5.2 and 5.3 that Technivest would pay or cause to be paid to MARA, the sum of RM4,329,320 in full and final settlement of loans which MARA had made to the Borrower Company together with the sum of RM 117,000, being the balance purchase price for the shares, whereupon MARA was to hand over the certificates and transfers for the shares and letters of resignation of their nominated directors on the Board of the Borrower Company.

Next, on 11 January 1990, the Managing Director of the Borrower Company Encik Ismail Affandi wrote to the Lender enclosing a copy of the Sale and Purchase Agreement and asked for an undertaking that the RM4.3 million would be forthcoming to pay MARA for the settlement of its liabilities.

Of course, the approval of the Foreign Investment Committee was required for the transaction, and this was duly obtained in May of 1990.

In the midst of these events, there occurred an event of critical substance — MARA had been advised by their Solicitors, by letter dated 14 June 1990, that the proposal by the Borrower Company to obtain finance to settle its obligation under the Sale and Purchase Agreement would violate s 67 of the Companies Act. The attention of the Lender's Solicitors was then directed to this letter. In the upshot, the Lender wrote to the Borrower Company that their offer letter dated 20 November 1989 was withdrawn and, as such, null and void.

The parties stood on common ground in saying and, indeed the Judge so found, that the raising of the RM4.3 million by a charge to be given by the Borrower Company over the Land would have amounted to direct financial assistance for the purchase of the shares in the Borrower Company because the terms of the Sale and Purchase Agreement clearly provided that unless this money was first paid MARA was not going to transfer the shares.

After a lapse of some three months, the Borrower Company submitted a fresh application for a fresh term loan and flexi loan facilities of RM4.3 million and RM0.5 million.

The Judge found, and we agree, that the Borrower Company must have represented to the Lender that the RM4.3 million was required as working capital because in the Lender's letter dated 25 September 1990 for this loan ('the second offer'), the purpose of the facility was stated to be 'For the working capital of the company'. Then, on 30 September 1990, the Directors of the Borrower Company passed a resolution accepting the second offer and agreeing to give the required securities which included the charge over the Land.

The Judge inferred — and we agree — that in connection with the second offer the Lender would have required to be furnished with evidence that the proposed new loan was not going to be used for a purpose in contravention of s 67 of the Act. In this regard, in its search for proof, the Lender had obtained confirmation in writing from the Borrower Company by letter dated 5 October 1990 addressed to it, stating categorically that all the shares which were the subject matter of the Sale and Purchase Agreement had already been transferred by MARA to Technivest on 15 September 1990.

At this point, we would interrupt the narrative of events, to observe that the Judge found, and we agree, that their letter of confirmation dated 5 October 1990, from MARA to the Lender, was critical because it showed that on that date there was no agreement in existence between the Borrower Company and the Lender for the provision of any moneys whatsoever. What was even more important, as the Judge observed, was that when the Borrower Company's Directors resolved to accept the second offer on 30 September 1990, all the shares in the Borrower Company had already been transferred to Technivest, some 15 days earlier. This point was made even more emphatic when MARA wrote a letter dated 9 October 1990 to the Lender, which being freely translated, was in the following terms:

TRANSLATION
IBU PEJABAT MARA

Bil. MARA: US/3212.

Tarikh: 9 Oktober 1990

Arab-Malaysian Finance Bhd
10th Floor, Bangunan Arab-Malaysian
No 55, Jalan Raja Chulan
50200 Kuala Lumpur

Tuan,

SALE OF 10,475,980 SHARES IN LORI (M) BHD

Gladly we confirm that our side had sold 10,475,980 shares in Lori (M) Bhd to Technivest Sdn Bhd.

2 We also confirm that the implementation of the above sale has already been completed and we have received full payment as specified in the Sale and Purchase Agreement as executed.

Thank you.

'BERKHIDMAT UNTUK NEGARA'

tt

(ROZLAN BIN MOHD IDRIS)
Unit Syarikat
MARA Kuala Lumpur

It was only after the above confirmation that the formal Loan Agreement was executed — that is to say, on 11 October 1990 — by which time the Borrower Company had become a subsidiary of Technivest.

It is unnecessary to go into the contents of the Loan Agreement for there are ample extracts from it in the Judgment of the Court below. Suffice it to say, that s 3.01 thereof contained representations and warranties by the Borrower Company which fortified the Judge's conclusion that the second offer was free from the taint which the first offer suffered. For example, para (1) thereof stated 'the acquisition by TSB (Technivest) of shares in the Borrower Company from MARA has been completed and Technivest is the registered shareholder of the said shares'. Then, as regards the purpose of the loan, s 4.02 of the Loan Agreement provided:

> The whole proceeds of the Loan shall be applied by the Borrower exclusively for the Borrower's working capital.

Both the Charge and the Loan Agreement were duly and properly executed on the same day, that is to say, on 11 October 1990.

On 19 October 1990, the Borrower Company issued a drawdown notice in writing, requiring payment of the full amount of RM4.3 million to be made to the Solicitors for the Borrower Company Messrs Nordin Hamid & Co for onward transmission to MARA. The draw down notice affirmed the truth and accuracy of the representations and warranties aforesaid.

The Lender complied and on 22 October 1990 despatched a cheque for RM4.3 million in favour of the legal firm of Messrs Nordin Hamid & Co.

In the events which followed, the Borrower Company had defaulted, whereupon the Solicitors for the Lender, by letter dated 9 September 1991, recalled the entire facility and, then, on 27 September 1991, the Lender served upon the Borrower Company the statutory notice in Form 16D under the Code after which the Lender commenced the proceedings by way of Originating Summons to enforce the Charge. The Borrower Company entered appearance through its Interim Receiver, who through his representative Mr Fernandis, put in an affidavit in opposition, alleging a breach of s 67 of the Companies Act, read with s 24 of the Contracts Act, as particularized above.

In the event, as we have stated at the outset, the Judge being satisfied that the Borrower Company had failed to satisfy him of the existence of 'cause to the contrary' within the meaning of s 254(3) of the Code, allowed the Lender's Application, by way of Originating Summons. It is from that judgment that the Borrower Company, through the Intervener, had appealed to this Court.

Before us, broadly stated, the grounds upon which Counsel for the Borrower Company attacked the Judgment of the Court below were twofold:

(1) It was said that the Judge was wrong in Law in determining the plea of illegality founded upon a breach of s 67 of the Companies Act, read with s 24 of the Contracts Act 1950, purely upon the affidavits, the contemporary documents and correspondence and the submissions of Counsel on both sides, when the circumstances of the case were such that only after a full investigation at a trial in Open Court, could the issue of illegality have been regularly tried. Accordingly, it was said the Judge ought to have exercised his discretion and converted the Originating Summons into a Writ Action.

(2) Alternatively, it was contended that if it was open to the Judge to have dealt with the case in the manner he did, he was wrong in Law, in holding, as he did in fact hold, that the loan facility arrangements pursuant to which the loans had been granted by the Lender to the Borrower Company was not in the nature of financial assistance given directly or indirectly for the purpose of or in connection with the purchase by Technivest from MARA of MARA's shares in the Borrower Company, and therefore, not in contravention of s 67 of the Companies Act, read together with s 24 of the Contracts Act. On the contrary, the Judge should have held that the loan transaction and the charge were illegal, void and unenforceable as having been entered into in contravention of s 67 of the Companies Act, read with s 24 of the Contracts Act, and dismissed the Originating Summons.

WAS THE ISSUE OF ILLEGALITY REGULARLY TRIED?

The Law on the approach of the Court of first instance in evaluating and resolving a conflict of evidence on affidavit was well captured by the Privy

Council in *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212 and in *Tay Bok Choon v Tahanson Bhd* [1987] 1 MLJ 433. A

In the first of these cases — *Eng Mee Yong* — Lord Diplock delivering the advice of their Lordships of the Board said this (at p 217D–E):

> Although in the normal way it is not appropriate for a Judge to attempt to resolve conflict of evidence on affidavit, this does not mean that he is bound B *to accept uncritically*, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however *equivocal, lacking in precision, inconsistent with undisputed contemporary document or other statements by the same deponent, or inherently improbable itself may be.* (Emphasis added.)

In the second of these cases — *Tahanson* — Lord Templeman put the point more shortly and generally, thus (at p 436I): C

> If allegations are made in affidavits by the petitioner and those allegations are *credibly denied* by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegation. (Emphasis added.)

D

The second point to note regarding this part of the case is that, it is an elementary proposition sometimes overlooked with resulting confusion and possible injustice that where statements are made by a deponent, based on information and belief, these ought not to be looked at at all, unless the court can ascertain not only the source of the information and belief but also unless the deponent's statement is corroborated by someone who speaks E from his own knowledge (see *Re JL Young Manufacturing Ltd Co* [1900] 2 Ch 753 at p 754, per Lord Alverstone CJ, applied by the old Federal Court in *Cantrans Services (1965) Ltd v Clifford* [1974] 1 MLJ 141 at p 143).

In the present case, the only material relied on by the Borrower Company in support of the plea of illegality aforesaid was an affidavit by Mr F Augustine who claimed to be a representative of the Court — appointed Receiver Tuan Syed Md Amin. Mr Augustine, of course, was not a party to the transactions and, naturally, had no personal knowledge of the same.

The Judge's approach in evaluating the evidence on affidavit, is reflected in the following passages in his judgment.

G

First of all, the Judge referred to the allegation made by Mr Augustine in his affidavit dated 15 February 1993, in these terms:

> Mr Augustine has alleged that the second offer and the documents executed to support the loan was designed by AMFB to circumvent s 67 of the Companies Act. In a nutshell he is saying that this is self-evident from the H letters between the parties dated 30 November 1989, 31 July 1990, 25 September 1990, 4 June 1990, 7 June 1990 and 18 July 1990, coupled with the payment made to LMB's Solicitors of RM4.3 million on 26 October 1990 and paid by them to MARA the very next day.

Next, the Judge's assessment of this allegation by Mr Augustine was as follows:

I

> With respect to Mr Augustine, what is self-evident is that his allegations are mere insinuations and innuendos which flies in the face of the documents

A themselves and the realities of the matter viewed from the perspective of AMFB, and their Solicitors.

Admittedly after the first offer was cancelled, AMFB wrote a letter dated 31 July 1990 to LMB in which they referred to the first offer letter and agreed to the money being released in one lump sum for onward transmission by AMFB's Solicitors to MARA (E 9 Ex 3A). But one of the signatories of this B letter En Lim Chin Choy has affirmed in his Affidavit that this letter was mistakenly forwarded to LMB after the facility was withdrawn. That this letter had no contractual force is also evidenced by the fact that there is no evidence that LMB ever signed the duplicate of this letter by way of acceptance and returned it in two weeks as the letter required them to do.

C The letters relating to the first offer can and ought to be severed from the consideration of the documents relating to the second offer and the formal contractual documents which resulted from it. What they show beyond all doubt is that AMFB did not enter into this transaction or disburse the moneys until it had received iron-clad assurances in writing from both MARA and LMB and its directors that the said shares had all been transferred and paid for *before* the loan documents were executed.

D

On the question of the Lender's state of knowledge and the nature of the transaction, the Judge said this:

There is not a shred of evidence that AMFB knew at any material time that the RM4.3 million had been transmitted by LMB's Solicitors to MARA on E 27 October 1990.

Nor is there a shred of evidence that AMFB knew when they executed the loan documents in October that the loan of RM4.3 million was intended to be paid by LMB to MARA and that unless this money was paid, MARA would not transfer its shares and that when the money was in fact paid over on 27 October 1990, it was paid for the purpose and by way of direct, indirect or F collateral consideration for the transfer of the said shares.

Mr Augustine's allegation of circumvention by AMFB is just that — an allegation without nothing to support it but innuendos and insinuations. Earlier I referred to a possible community of purpose between the incumbent Directors and the Receiver in taking this Defence. If Mr Augustine's innuendos have any substance, he must mean that the signatories of MARA's G letter of 5 October 1990, LMB's Director's resolution dated 30 September 1990, MARA's letter dated 9 October 1990, the loan documents with particular reference to the representations and warranties earlier referred to, and the purpose of this loan, and LMB's notice of drawdown dated 19 October 1990 all told blatant untruths, knowing them to be untrue, ie that the said shares had not been transferred and/or paid for in full by H 15 September 1990. The fact that Mr Augustine has very carefully avoided saying so is not irrelevant. The fact that none of them has come forward to depose to any such assertion is the most cogent proof, that there is no real evidence to support Mr Augustine's assertions.

We would observe that in considering the allegations of illegality, the Judge quite rightly pointed out that these allegations 'were mere insinuations and I innuendos which flew in the face of the documents themselves and the realities of the matter viewed from the perspective of AMFB (the Lender) and their Solicitors'(see p 42 AR).

No attempt had been made by Mr Augustine to disclose the sources of his information and belief to ground his allegations of illegality and, on this ground alone, the Judge would have been justified in refusing to look at Mr Augustine's affidavit, applying Lord Alverstone's famous enunciation of principle in *Re JL Young Manufacturing* (ibid) quoted above.

Nevertheless, the Judge did embark upon a most careful examination of the allegations of illegality made by Mr Augustine and, having done so, we consider he was amply justified in resolving the conflict of evidence on affidavit, in accordance with the principles enunciated in *Eng Mee Yong v Letchumanan* (ibid), and coming down strongly in favour of the Lender. We can detect no error in his reasoning when exercising his discretion regarding this part of the case. It would therefore have been a pointless exercise for the Judge to have converted the Originating Summons into a Writ Action. At a trial in Open Court there is no ground for supposing that the quality of Mr Augustine's testimony would have been superior to his affidavit evidence. Indeed, most probably, cross-examination would have made it even clearer that his allegations were virtually worthless as evidence and would thus have led to an unnecessary prolongation of proceedings and increased costs. This ground of appeal therefore fails.

We must next address the alternative submission of the Borrower Company which alleged that the loan transaction and the charge given as security for it, were in contravention of s 67 of the Companies Act, read with s 24 of the Contracts Act, and therefore illegal, void and unenforceable.

THE ILLEGALITY POINT: SECTION 67 OF THE ACT

Does a breach of s 67 of the Act have any civil consequences? This is the key issue in this appeal which can only be determined upon a proper construction of s 67 read with s 24 of the Contracts Act.

To put the matter in perspective, the provisions of the Act and the Contracts Act which it is convenient to set out are as follows.

The relevant parts of s 67 of the Act read as follows:

> (1) Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, ... in any way purchase deal in or lend money on its own shares.
>
> ...
>
> (3) If there is any contravention of this section, the company is, ..., not guilty of an offence but each officer who is in default shall be guilty of an offence against this Act. ...
>
> ...
>
> (6) Nothing in this section shall operate to prevent the company [*or any person*] from recovering the amount of any loan made in contravention of this

A section or any amount for which it becomes liable, [*either*] on account of any financial assistance given, [*or under any guarantee entered into or in respect of any security provided*], in contravention of this section.

The italicised bracketted words above were inserted by Act A836 which was with effect from 10 September 1992 and are therefore not applicable to this B case.

The relevant parts of s 24 of the Contracts Act read as follows:

The consideration or object of an agreement is lawful, unless —

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law; C

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is D unlawful is void.

Under s 2(g) of the Contracts Act, an unlawful agreement is not enforceable.

It is a familiar proposition that courts should be slow to find illegality and strike down commercial transactions (see, eg *St John Shipping Corp v* E *Joseph Rank Ltd* [1956] 3 All ER 683 at pp 690, 691; *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 244 at p 247). But, if Counsel for the Lender is correct in his contention, then he is entitled to succeed, for this is not a court of morals but a court of Law.

We must now embark upon a consideration of the question for decision F regarding this part of the case.

The Reasoning of the High Court

The Judge does not appear to have addressed the question whether a breach of s 67 has civil consequences in depth and this may well have been because G he felt that he was bound by the decision of the Supreme Court in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd* [1990] 1 MLJ 356 where the Bank lost and which we shall be reviewing somewhat extensively.

The Judge gave two reasons for rejecting the submission of Counsel for the Borrower Company based on an alleged breach of s 67.

H In the first place, he said this:

Even if it were the case that there was some conspiracy afoot between the officers concerned in MARA and Technivest (as suggested by Mr Augustine) to defeat s 67 of the Companies Act (and I have not seen any real evidence to that effect), it is my view that it cannot affect the validity of the charge which is the subject matter of this action or the other loan document because there I is overwhelming evidence before me that AMFB entered into this transaction in good faith and upon the clear representation of all concerned that all the shares had been transferred and fully paid for. This is a civil case and AMFB is entitled to rely upon the estoppels created by these representations. The

charge must therefore be held valid. A

In the second place, he said this:

> There is another reason why this is so. AMFB's contract was with the Company LMB. Even if there was criminal conduct on the part of the officers concerned in MARA and Technivest and LMB in misrepresenting to AMFB that the shares had been transferred and fully paid for, s 67(3) of the Companies Act 1965 provides as follows: B
>
> > 'If there is any contravention of this section, the company is, notwithstanding s 369, not guilty of an offence but each officer who is in default shall be guilty of an offence against this Act.
> >
> > Penalty: Imprisonment for two years or ten thousand ringgit or both.' C
>
> Since LMB was not guilty of any offence this contract cannot be tainted with any illegality from that quarter. I have already said that so far as AMFB is concerned, there is no evidence of any criminal conduct on its part or on the part of its servants or agents. Actual knowledge has to be proved on their part to the effect that they knew that the representations made were false. There is not a shred of evidence before me to this effect. D

The Estoppel Point

Before proceeding further, we would say that if as a matter of construction, a breach of s 67 has civil consequences, then we regret we are unable to agree with the Judge that a plea of estoppel could salvage the case for the Lender. E

The case of *Re a Bankruptcy Notice* [1924] 2 Ch 76 at p 96 (per Atkin LJ) shows that there is, in most cases, no estoppel against a defendant who wishes to set up the statutory invalidity of some contract or transaction on which he is being sued, despite the fact that by conduct or other means he would otherwise be bound by estoppel. This point is fully discussed in the Privy Council case of *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] 1 All ER 300 (per Viscount Radcliffe especially at pp 307–309C). The case of *Kan Yeow Wing v Keng Soon Motor Finance Co* [1962] MLJ 391 (per HT Ong J at p 394B) can be seen as an application of this principle. F

In our view, for reasons which will appear later in this judgment, sub-s (6) of s 67 of the Act is intended for the protection not only of the company but also, inter alia, of other creditors who may have dealings with the borrower. In such a situation, the section overides an estoppel or, to put it another way, the plea of estoppel cannot be set up in the face of the subsection. G H

Section 66 of the Contracts Act

Similarly, if a breach of s 67 of the Companies Act has civil consequences, then the fact that the financier had no knowledge of the alleged illegality and the true nature of the transaction will not convert a void, illegal and unenforceable transaction into a legal one (see s 24 Contracts Act and *Re an Arbitration between Mahmoud and Ispahani* [1921] 2 KB 716). Though, of course, in such a situation, it would be possible for the financier to recover under s 66 of the Contracts Act 1950 which is a restitutionary provision having no direct counterpart in English Law. Section 66 provides: I

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received *any* advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

The 'advantage' under the section would, no doubt, include a loan, thus enabling a financier, with no knowledge of the illegality to recover (see *Menaka v Lum Kum Chum* [1977] 1 MLJ 91).

Professor Visu Sinnadurai in his helpful work on the *Law of Contracts in Malaysia and Singapore* (2nd Ed) has neatly summarized the effect of s 66 thus:

> ... section 66 is a restitutionary provision and any remedy granted under the section is not based strictly on contract. The general principle under English law is that the courts will not enforce nor grant any remedy under an illegal contract. However, one of the main exceptions to this rule is that an innocent party may obtain certain remedies, whereas no remedy is available to a guilty party. Section 66 is a wide provision which has no direct parallel under English law. English cases are, therefore, not relevant in determining the scope of s 66. If the agreement 'is discovered to be void', s 66 will apply. 'Discovered' has been interpreted to mean that the illegality must not have been known to the party seeking restitution under s 66 at the time the agreement was made. In other words, no remedy will be granted to the guilty party under s 66. In each case, therefore, the courts have to examine the facts of the case to determine whether the party was aware of the illegality at the time the agreement was entered into.

Subsection (6) of s 67 the Act

But, to revert, the problem we have to grapple with here, is a question of construction of s 67 of the Act, in particular, whether the effect of sub-s (6) of s 67 is to save a transaction which contravenes s 67(1), from invalidity?

It would, therefore, be convenient, if we next directed our attention to the decision of the Supreme Court in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd* (ibid).

THE DECISION OF THE SUPREME COURT IN CHUNG KHIAW BANK REVIEWED

In *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd* (ibid), the question whether a breach of s 67 of the Act has civil consequences, arose acutely for decision and, therefore, we are obliged to undertake a review of it.

The Judgment Analysed

The grounds upon which the Supreme Court held against the Bank may be stated thus.

Broadly stated, the facts there were that the bank gave a loan to a company to purchase shares in the hotel on the security of, inter alia, a registered charge over the hotel's land. The company having defaulted, the bank commenced proceedings to recover the loan.

The two questions for determination were whether the transaction was in contravention of sub-s (1) of s 67 and, if so, whether that had civil

consequences having regard to sub-s (6) of s 67. A

It identified the crucial issue as being the effect of s 67 of the Act. It referred to the judgment of Chang Min Tat J in *Wai Hin Tin Co Ltd v Lee Chow Beng* [1968] 2 MLJ 251 as a good starting point, where it was held that the company could not recover a loan the avowed purpose of which was to assist the defendant to pay for the purchase of shares in itself — an unlawful transaction under the relevant legislation. This was a case decided under ss 47 and 48 of the Companies Ordinance (No 49 of 1940) which did not carry a saving provision such as the present sub-s (6) of s 67 and Chang Min Tat J did make the observation that the civil consequences would have been different had there been a saving provision. B

The Court first considered the question whether the transaction breached sub-s (1) of s 67 and answered this question against the Bank, on the ground that sub-s (1) of s 67 prohibits any financial assistance given directly or indirectly for the avowed object of dealing in the shares of a company — a widely worded prohibition, derived from the rationale for the rule in *Trevor & Anor v Whitworth & Anor* (1887) 12 App Cas 409 which was a view adopted by the old Federal Court in *Mookapillai & Anor v Liquidator, Sri Saringgit Sdn Bhd & Ors* [1981] 2 MLJ 114, where the prohibition was extended to a vendor of shares. The Court decided that there had been a breach of sub-s (1) of s 67. C D

Next, the Court considered the question what is 'the effect on a contract where it is prohibited by statute'? This being a general question, the Court first examined the position at Common Law. E

After referring, with approval, to the English case of *Phoenix General Insurance Co of Greece SA v Administratia Asigurarilor de Stat* [1987] 2 All ER 152 which in turn followed a well-known passage in the judgment of Parke B in *Cope v Rowlands* (1836) 150 ER 707, and then to the judgment of the High Court of Australia in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd & Ors* (1978) 139 CLR 410, the Court concluded (at p 361 col 1 E, F) that 'it may be stated as a general principle that a contract, the making of which is prohibited by statute expressly or by implication, shall be void and unenforceable unless the statute saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself'. F G

To reinforce this view, the Court then made more than a passing reference to the Privy Council case of *Menaka v Lum Kum Chum* [1977] 1 MLJ 91, a moneylending case which raised an issue of illegality for breach of s 8(c) of the Moneylender's Ordinance which related to licensing requirements. H

The Court then referred, with approval, to the principle illustrated by that case, that where it is shown that a contract is void because it is prohibited by statute, courts, as a general rule, should not lend their assistance to enforce the contract.

The Court then referred to a passage in the judgment in *Vita Food Products Inc v Unus Shipping Co Ltd (in liquidation)* [1939] 1 All ER 513, where Lord Wright cautioned as to the danger of (at p 523E–F): I

> ... the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of

A public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.

But, the Supreme Court added, that merely reflected the position at Common Law.

B The Court then directed its attention to s 24 of the Contracts Act 1950 (which it reproduced) and noted that it might well have had its origins in an old Common Law principle, but that as it is a statutory provision, the Courts in this country are bound to give effect to it. Consequently, the trend shown in Common Law countries to be slow in striking down illegal contracts was untenable in this country

C The Court next referred to s 3 of the Civil Law Act 1956 (which directs the courts, inter alia, to apply the Common Law of England in force as at 7 April 1956 (for the Malay States) only in so far as the circumstances permit and save where no provision has been made by statute law). This meant, so the Court said, that the development of the Common Law after D 7 April 1956 (for the Malay States) was entirely in the hands of the Courts 'in this country, and so, we cannot just accept the development of the Common Law in England'.

Having said that, the Court then considered the submission of counsel for the Bank that because the second limb of sub-s (6) of s 67 of the Act provides that the section shall not operate to prevent the company from E recovering 'any amount for which it becomes liable', the company's liabilities to third parties were not affected by the prohibition in the section. This submission failed solely on the ground that having regard to the words 'recovering the amount of any loan made in contravention of this section', it followed, that 'the scope of s 67(6) is confined only to the protection of F the company and no one else'.

The Court went on to say, that what was important to note was that the bank had knowledge of the illegality and the nature of the transaction.

We shall consider each of the grounds upon which the Supreme Court in *Chung Khiaw Bank* arrived at its decision.

G To recaptulate, in summary, the crux of the reasoning of the Supreme Court in *Chung Khiaw Bank* would appear to be this: a transaction prohibited by s 67 of the Act is void and illegal because, in this country we are bound to give effect to s 24 of the Contracts Act. The submission by Counsel for the Bank, that because of the words 'for which it becomes liable' appearing in the second limb of sub-s (6) of s 67, the company's H liability to third parties remains unaffected by the prohibition contained in that section, was untenable because the section gave protection only to the company and no one else. Lastly, it was important to note that at all material times the Bank had knowledge of the illegality and the nature of the transaction. In the result, the Bank lost.

I OUR COMMENTS ON THE JUDGMENT

Introduction

We regret we find it difficult to agree with the reasoning of the Court in *Chung Khiaw Bank* for reasons which follow.

As to the point concerning s 24 of the Contracts Act, it is obvious that this section was taken from s 23 of the Indian Contract Act, which in turn was inspired by the Common Law of England, and should therefore be construed in that light (see *Gherulal Parakh v Mahadeodas* [1959] Supp SGR 406; [1959] ASC 781 at p 797). We have noted the cogent comments by Professor V Sinnadurai in his *Law of Contracts in Malaysia and Singapore* (2nd Ed, p 357-366) and read with interest the analysis of the cases on the approach of the Courts in interpreting statutes in the area of statutory illegality by Varsha L Doshi in her recent book on *Restitutionary Remedies in Illegal Agreements* (1998) at pp 45–55.

Is the trend in Common Law Countries to be slow in striking down Commercial Contracts applicable here?

It is true that s 3 of the Civil Law Act, 1956, directs our courts to apply the Common Law of England in force at the date of its coming into effect, that is 7 April 1956, only in so far as the circumstances permit and save where no provision has been made by statute law. We therefore heartily agree with the Court in *Chung Khiaw Bank* that the development of the Common Law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country. But, having said that, we consider that the trend shown by the courts in Common Law countries to be slow in striking down commercial contracts on the ground of illegality is a sensible one, which we should follow thus incorporating it as part of our Common Law.

Indeed, twenty years ago, this is precisely what Raja Azlan Shah CJ (now HRH the Sultan of Perak) had done in *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 144. Here is what his Lordship said (at p 247C), when speaking for the old Federal Court:

> We bear in mind the much quoted and common sense warning by Devlin J in *St John Shipping Corp v Joseph Rank Ltd* [1956] 3 All ER 683 at pp 690, 691) against a too ready assumption of illegality or invalidity of contracts when dealing with statutes regulating commercial transactions.

We would observe that two points are noteworthy about the *Central Securities* case; first, the dispute there arose out of a sale and purchase transaction of shares an event which occurred on 12 March 1975; in other words, long after the critical date of 7 April 1956 referred to in the Civil Law Act, yet we find Raja Azlan Shah CJ applying the Common Law trend in England and, second, the *Central Securities* case was not referred to by the Court in *Chung Khiaw Bank*.

The General Rule at Common Law

It is well settled that at Common Law, a contract or transaction in breach of a statutory prohibition and an associated contract is, in general, void for illegality even though the statute is silent as to its consequences and merely inflicts a penalty on the wrongdoers (See *Menaka v Lum Kum Chum* (ibid), at p 94, *Phoenix General Insurance Co of Greece SA v Administratia Asigurarilor de Stat* (ibid)) but this is subject only to any contrary intention

manifested by the statute (see *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (ibid)).

The next topic to be logically considered is the key issue: whether sub-s (6) of s 67 of the Act excludes the operation of s 24 of the Contracts Act?

Does sub-s (6) of s 67 of the Act exclude the operation of s 24 of the Contracts Act?

It will be recalled that in *Chung Khiaw Bank*, the submission advanced by counsel for the Bank that the effect of the second limb of sub-s (6) of s 67 of the Act, which provides that the section shall not operate to prevent the company from recovering 'any amount for which it becomes liable' and therefore the company's liability to third parties remains unaffected by the prohibition in the section, was rejected by the Supreme Court solely on the assumption that the scope of sub-s (6) of s 67 was confined to the protection of the company and no one else. Having so held, perhaps understandably, the Court made no attempt to actually construe the all–important five words 'for which it becomes liable' appearing in the subsection.

With respect, we find it difficult to agree with the *ex cathedra* pronouncement of the Supreme Court that the scope of sub-s 6 of s 67 is confined to the protection of the company and no one else for it is flatly contradicted by a wealth of respectable authority. It will suffice if we refer to just a few of these cases.

In *Wallersteiner v Moir* [1974] 3 All ER 217 at p 255, Scarman LJ (as he then was) held (at p 255A) that the section (s 54 of the Companies Act 1948, the counter part of our s 67) must have been enacted to protect the company funds and the interests of shareholders *as well as creditors*.

In *Skelton v South Auckland Blue Metals Ltd* [1969] NZLR 955, Woodhouse J ruled that the equivalent New Zealand section was aimed at protecting the interests of contributories and creditors.

In *Re Ferguson; ex p Thorne (In Liq)* (1969) 14 FLR 311 at p 316, we find Gibbs J saying (at p 316) that the equivalent Australian section was not enacted for the protection of the company but was passed in the *public interest generally*.

In his book *'Principles of Corporate Law'* (6th Ed) (1992) at p 226 para 867, Ford says, with reference to the provision contained in s 205 (Aust) prohibiting a company giving financial assistance for the purpose of acquisition of its own share or shares of its holding company, that 'the section reinforces the case law that a company's resources are to be used only for proper corporate purposes: *Skelton v South Auckland Blue Metals Ltd* (ibid). It is a protection of a *company's creditors* and minority shareholders against deployment of a company's financial resources in such a way that the company gives up value in exchange for an obligation or repayment on the part of the controller which may turn out to be worthless if the controller becomes insolvent. (Emphasis added.)

Denning LJ's definition of the ordinary meaning of the word 'liable' in *Littlewood v George Wimpey & Co Ltd & Anor* [1953] 2 All ER 915 at p 921 is often quoted. In that case, his Lordship said: '... the ordinary meaning of

the word "liable" in the legal context is to denote the fact that a person is responsible at law. A

The *Oxford Companion to Law* supports Lord Denning and, in fact, makes the meaning of the word 'liable' even clearer. What it says is this:

> a person is said to be under a liability when he is, or at least may be, legally obliged to do or suffer something. B

'Liable' is generally regarded by purists as a word of modern English and not having any existence in ancient documents. It means very little more than 'under an obligation', so said Kekewich J in *Re Chapman; Cocks v Chapman* [1896] 1 Ch 323 and shortly after that the same learned Judge in *Re Hill; Hill v Pilcher* [1896] 1 Ch 962, said it 'must mean, to some extent, 'under an obligation'. C

Osborne's Concise Law Dictionary (8th Ed) at p 200 states that 'liable' means 'subject to or incurring legal liability'.

Looking at the second limb of sub-s (6) of s 67 ourselves, we consider that the section was enacted for the protection of the company's funds and the interests of shareholders *as well as creditors* and, we would add, the public generally. D

That being so, we can think of no valid reason why its operation should be limited only to enabling a company to recover loans granted by it, as was held by the Supreme Court in *Chung Khiaw Bank*. E

Another point to which we should like to direct attention is that in arriving at its conclusion that the prohibited transaction concerned was illegal, void and unenforceable, the Court in *Chung Khiaw Bank* was unduly swayed by certain English authorities. In particular, we should like to point out that these English cases were really of little assistance since the relevant legislation on which they were decided did not contain a saving provision equivalent to our sub-s (6) of s 67 of the Act. Yet another difference was that the prohibition under the relevant English legislation imposed criminal liability not only on officers of the company but also on the company itself, *whereas* under our s 67 criminal liability is imposed not *on* the company but only *on* officers of the company — a point on which the Court below laid much stress, and justifiably so. F G

In view of the differences referred to in the relevant comparative legislation and our legislation, the reliance placed by the Supreme Court in *Chung Khiaw Bank* on English cases such as *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724; *Selangor United Rubber Estates Ltd v Cradock (a bankrupt) & Ors (No 3)* [1968] 2 All ER 1073; *Heald & Anor v O'Connor* [1971] 2 All ER 1105; [1971] 1 WLR 497; *Wallersteiner v Moir* [1974] 3 All ER 217 and *Carney v Herbert & Ors* [1985] 1 All ER 438, was open to some justifiable criticism. (See, eg the well-researched article by Miss Lai Ching Sum entitled *'Section 67 of the Companies Act: A Hornet's Nest?'* [1992] 2 MLJ xi.) H I

Next, we must refer to the case of *Victor Battery Co Ltd v Curry's Ltd & Ors* [1946] Ch 242, the reasoning of which the Supreme Court did not follow in *Chung Khiaw Bank*.

A In *Victor Battery* it was held that mortgage of a company's assets was valid and enforceable although it was given as security for a loan to the company which the lender knew would be used to assist someone to acquire shares in the company.

In *Curtis's Furnishing Stores Ltd (In liquidation) v Freedman* [1966] B 2 All ER 955 Cross J followed *Victor Battery*, though in *Selangor United Rubber Estates Ltd v Cradock (a bankrupt) & Ors (No 3)* [1968] 2 All ER 1073 at p 1153, *Victor Battery* was doubted and indeed, in *Heald & Anor v O'Connor* [1971] 2 All ER 1105; [1971] 1 WLR 497, *Victor Battery* was disapproved and not followed.

We must, however, interpolate to add that in *Selangor United Rubber* C *Estates Ltd v Cradock (a bankrupt) & Ors (No 3)* (ibid), in considering s 54 of the English Companies Act 1948, which prohibits a company from lending money to purchase its own shares, Thomas J did say this (at p 1154A–B):

> D If such a loan is valid, then it seems to me that it can only be on the ground that the section itself establishes that, despite its declaring it unlawful for a company to give by means of a loan financial assistance for the purchase of shares in the company, yet the ordinary consequences of such illegality are not to follow. Statute, of course, could so provide expressly or by implication.

A decade later, in *Yango Pastoral Co Pty Ltd & Ors v First Chicago Australian* E *Ltd* (ibid) — a case which has rightly been regarded as one of the most important Common Law decisions in the field of statutory illegality — we find Gibbs ACJ saying much the same thing (at p 413):

> ... it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable.

F Having said that, we are aware that Mr Gower in his highly regarded book on *Principles of Company Law* (5th Ed) at p 237, considered that *Victor Battery* was wrongly decided and went as far to describe it as 'heretical'. However, in our view, in so far as sub-s (6) of s 67 of the Act enables any person to recover any moneys in respect of a security in contravention of the section, the subsection appears to be a statutory recognition of the rule in G *Victor Battery* wherein it was decided that an illegal security given by a company to finance the purchase of its own shares contrary to s 45(1) of the Companies Act 1929 (UK) (being the equivalent of our s 67(1) of the Act), was not avoided. We would add, however, that the Companies Act 1929 (UK) did not have a provision equivalent to our sub-s (6) of s 67. It follows that even if *Victor Battery* was wrongly decided, it matters not for in our view H the principle enunciated therein has been statutorily recognized in sub-s (6) of s 67. It is a maxim of the Law that the duty of the Courts is merely to give effect to the will of Parliament as expressed in the Law.

Looking back, if we may say so, with great respect, perhaps the most important point to note regarding *Chung Khiaw Bank* is that as a result of I failing to actually construe the five words 'for which it becomes liable' in sub-s (6) of s 67, the Court took a wrong turning and placed undue stress on the provisions of s 24 of the Contracts Act and held that because the

Bank had knowledge of the illegality and the nature of the transaction at the material time, the Bank's claim failed. A

Lest we be accused of an oversight, mention should be made of the Supreme Court decision in *Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Ors* [1990] 1 MLJ 485, where the Court followed uncritically certain Commonwealth authorities on financial assistance and concluded, without discussion, that a prohibited transaction would be unenforceable and void. We do not, therefore, find this case of much assistance. B

Conclusion

In our view, sub-s (6) of s 67 creates an important exception to s 24 of the Contracts Act by allowing recovery under an illegal contract, thereby excluding the operation of s 24. A good illustration of the application of such a provision is found in the well-known Privy Council case of *Batu Pahat Bank Ltd v Official Assignee of the property of Tan Keng Tin* [1933] AC 691, per Lord Russell at pp 238-239. In our view, the words of Lord Russell would apply equally to s 67 of the Act. See, also, *Datuk Tan Lay Teck v Sarjana Sdn Bhd & Ors* [1997] 3 AMR 2718 at p 2757, per Augustine Paul JC, as he then was, which is precisely in point. C D

With the most profound respect, we consider that *Chung Khiaw Bank* was decided *per incuriam* because of its failure to actually construe the all important five words 'for which it becomes liable' appearing in sub-s (6) of s 67. In our view therefore, in a situation where a company obtains a loan from a financial institution on the security of a charge over its land for the purpose of enabling an intending purchaser to purchase shares of the company, the company's liability to the financial institution both in respect of the loan and the security remains unaffected, having regard to the saving provision in the second limb of sub-s (6) of s 67 of the Act. E F

Consequently, the Borrower Company's allegations, even if true, would not provide the existence of 'cause to the contrary' within the meaning of s 256(3) of the Code.

PERSONAL LIABILITY OF RECEIVER FOR COSTS G

There is a final point. We note that the Judge made an order that the costs arising out of and incidental to these proceedings from the date of Mr Augustine's First Affidavit dated 19 November 1992 up to and including the date of his judgment be taxed and that the Appellant ('the Borrower Company'), the Interim Receiver and Mr Augustine be jointly and severally liable therefor. He further ordered that 'the Respondent alone shall be liable to the Plaintiff for the taxed costs of these proceedings from its inception up to 19 November 1992 and for the extraction of the order of this Court and thereafter'. H

The Judge went on to say, that he had made the Interim Receiver and Mr Augustine personally liable for the relevant portion of the proceedings because it was his view that accusations of criminal conduct should not be made unless there is cogent evidence to support them. The standard of proof, he remarked, was very high and as both these individuals had the I

advantage of legal advisers to assist them they should have been aware of the consequences of making the kind of imputations they had put forward without proper evidence to support them.

It is, of course, clear Law that costs being in the discretion of the Court, a receiver may be ordered personally to pay costs incurred by reason of his misconduct or neglect in the discharge of his duties (see *Re Suffield and Watts; ex p Brown* (1888) 20 QBD 693; 36 WR 303). A receiver may be, and frequently is, directed to bear personally the costs of unnecessary applications or appearances (see, eg *O'Kelly v Gregg* (1838) Jo & Car 76; *Re Doolan* (1843) 2 Con & Law 232; *Payne v Lamb* (1844) 8 I Eq R 517; *De Montmorency v Pratt* (1849) 12 I Eq R 411; *Delacherois v Wrixon* (1850) 2 In Jur 67). He will not, however, be held personally responsible if he has honestly done his best and failed (see *Kerr on Receivers and Administrators* (17th Ed) p 210).

However, having regard to the circumstances of the case as a whole, the grounds upon which the Interim Receiver and Mr Augustine were ordered personally to pay costs incurred, could be disputed. The fact that they had relied on professional legal advice in opposing the Originating Summons is a factor which should have told in their favour rather than against. (See *Bunt v Hallinan* [1985] 1 NZLR 450 at p 462, para 1 CA which provides a close analogy.) It would, of course, be different if they had opposed the Originating Summons *contrary* to the advice of their legal advisers. But, of course, there was no evidence of this. Indeed, all the evidence was the other way.

For these reasons, we would set aside both the orders requiring the Interim Receiver and Mr Augustine to be personally liable for costs in respect of the relevant portion of the proceedings.

THE RESULT

For the reasons stated we consider that the decision of the Judge that the Borrower Company had failed to satisfy the Court as to the existence of 'cause to the contrary' within the meaning of s 256(3) of the Code, was right and we accordingly affirm the same.

We therefore remit the Originating Summons to the High Court, Shah Alam, with a direction to grant the prayers therein, including the prayers for sale of the Land and to make such further or other consequential orders and directions as are required under s 257(1), (2) and (3) of the Code.

Consequently, the appeal is dismissed, save and except that, the orders as to costs aforesaid against the Interim Receiver and Mr Augustine are, as we have said, set aside. The Borrower Company must pay the costs of this appeal, to the Lender. Deposit to the Lender to account of taxed costs.

Finally, we should like to record our appreciation of the able manner in which the appeal was argued by Counsel on both sides.

Appeal dismissed.

Reported by Ng Sheau Jiuan